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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CONTINENTAL LYNWOOD, Plaintiff and Appellant, v. LYNWOOD REDEVELOPMENT AGENCY, Defendant and Respondent.	B181483 (Los Angeles County Super. Ct. No. BC292260)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Joseph R. Kalin, Judge. Reversed.

Moldo Davidson Fraioli Seror & Sestanovich LLP, Patrick A. Fraioli, Jr., James M. Gilbert, Jamie N. Gonzalez and Steven Moyer for Plaintiff and Appellant.

Law Offices of Ronald N. Wilson & Associates, Ronald N. Wilson and Maurice L. Chenier for Defendant and Respondent.

Continental Lynwood LLC (Continental) appeals from a judgment entered after the trial court granted Lynwood Redevelopment Agency's (LRA) motion for terminating sanctions and denied Continental's motion to set aside the dismissal of its action for declaratory relief. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *LRA's Motion for Terminating Sanctions*

Continental, which leased a parking lot from LRA, filed an unverified complaint for declaratory relief on March 18, 2003 arising out of a dispute with LRA over the terms of the lease. LRA answered the complaint on May 12, 2003 and on October 6, 2003 served on William Elperin, Continental's counsel, a set of form interrogatories. On January 7, 2004 LRA served both a request for production of documents and set of special interrogatories.

Because Continental had served no responses to the form interrogatories, on January 30, 2004 LRA moved to compel responses to the form interrogatories without objection and for $2,500 in sanctions to pay reasonable costs and attorney fees. No response to the motion was filed, and no discovery responses were provided by the time of the hearing. On February 26, 2004 neither Continental nor Elperin appeared at the hearing on Continental's motion. The court granted the motion, awarded sanctions to LRA in the amount of $1,500 and continued the previously scheduled final status conference from February 27, 2004 to June 25, 2004 and trial from March 8, 2004 to July 6, 2004.

On April 6, 2004 LRA moved to compel responses to the special interrogatories and document requests it had served on January 7, 2004. LRA also moved for terminating sanctions based on Continental's failure to comply with the court's February 26, 2004 order granting LRA's motion to compel responses to form interrogatories. No response to the motions was filed by Continental. At a hearing on April 28, 2004, which, once again, neither Continental nor Elperin attended, the trial court granted LRA's motion for terminating sanctions and denied the motion to compel as moot. No document entitled "dismissal" was entered by the court; however, on May 7,

2004 a separate "order" was signed by the court stating the motion for terminating sanctions had been granted.

2. *Continental's Motion to Set Aside the Dismissal of Its Action*

On May 20, 2004 Continental, represented by new counsel, filed an ex parte application for an order setting aside "the dismissal, terminating sanction" and to vacate any judgment entered in the action pursuant to Code of Civil Procedure section 473, subdivision (b),[1] or, in the alternative, for an order shortening time on a noticed motion. The application included a declaration from Elperin stating that in September 2003 he began suffering from a serious heart condition and other medical conditions that caused him to neglect his cases[2] and a declaration from Yuri Ripinsky, the Continental principal charged with monitoring the litigation with LRA, stating Ripinsky had contacted Elperin in December 2003 to inquire about the status of the case and was told the case was being attended to, was never made aware of Elperin's inability to attend to the case and never received LRA's discovery requests or notice of the court's orders on its discovery motion. The court denied the ex parte application and set the matter for hearing on regular notice.

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[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] Among other things Elperin admitted he had received the discovery propounded by LRA but failed to inform Continental or respond to it and failed to attend the hearings on Continental's motion to compel and motion for terminating sanctions. Elperin stated, "12. During the period between September 2003 until present, I have been suffering from a serious heart condition, extra heartbeat and metabolic disorder. I am taking seven (7) prescription drugs daily. My family has a history with heart problems as my father passed away from a heart condition at the age of thirty (30). This has caused me to be bedridden and under the care of a physician during the time frame outlined above. As a result, I have not been in the office, except on rare occasions and have not been able to properly attend to my cases. [¶] 13. The effects of my heart condition have been the reason for my failure to respond to the written discovery and to comply with the various discovery orders set forth above. [¶] 14. Due to my heart condition, I was unable to and did not inform my clients of the developments and the Court's order, as outlined above, in this action. [¶] 15. My clients in this action were unaware and did not receive notice and orders of the developments as outlined above."

In opposition to Continental's motion to set aside the dismissal, LRA asserted, among other things, that, other than Elperin's declaration, which LRA contended lacked credibility, there was no evidence (for example, a declaration from Elperin's doctor) he was ill. LRA also argued Continental had an independent duty to monitor the progress of the litigation, but failed to do so. In its reply Continental attached copies of explanation-of-benefit forms from Elperin's insurance company relating to his treatment and summary-of-service receipts from the hospital where Elperin received treatment.

At a hearing on June 16, 2004 the trial court commented it was "suspicious" about the lack of communication between Ripinsky and Elperin and continued the hearing to permit LRA to depose Ripinsky about his knowledge of the litigation. After a hearing on October 14, 2004 the court -- Judge Joseph R. Kalin, who had replaced the judge presiding over the case from its inception (Hon. Elizabeth Grimes) -- took the matter under submission and subsequently denied Continental's motion to set aside the dismissal. The trial court did not specify any basis or articulate its rationale for denying the motion.

DISCUSSION

Section 473, subdivision (b), authorizes the trial court to relieve a party from a default judgment or dismissal entered as a result of the party's attorney's mistake, inadvertence, surprise or neglect.[3] It provides for both mandatory and discretionary

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[3] Section 473, subdivision (b), states, "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . . No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or

relief. Mandatory relief is available "whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

"'Enacted in 1988, the attorney affidavit provision of section 473 originally applied only to defaults. Its purpose was "to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits."'" (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1396.) In 1992 the Legislature extended the relief available for attorney fault to include relief from dismissals. "'The State Bar, which sponsored the amendment, argued that "'it is illogical and arbitrary to allow mandatory relief for defendants when a default judgment has been entered . . . and not to provide comparable relief to plaintiffs whose cases are dismissed for the same reason.'"'" (*Ibid*.) Although the statute refers generally to "dismissals," most appellate courts, examining the language and history of the statute, have concluded the Legislature intended the word "dismissal" to have a limited meaning in the context of the mandatory relief portion of section 473, subdivision (b). (E.g., *English v. IKON Business Solutions* (2001) 94 Cal.App.4th 130, 148; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 618.) Accordingly, mandatory relief has been restricted to those dismissals that are "procedurally equivalent to a default" and, in particular, when the plaintiff's counsel failed to oppose the motion to dismiss. (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1817 ["when the Legislature incorporated dismissals into section 473 it intended to reach only those dismissals which occur through failure to oppose a dismissal motion -- the only dismissals which are

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dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310."

procedurally equivalent to a default"]; *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 601 ["'[A] default judgment is entered when a defendant fails to appear, and, under section 473, relief is afforded where the failure to appear is the fault of counsel. Similarly, under our view of the statute, a dismissal may be entered where a plaintiff fails to appear in opposition to a dismissal motion, and relief is afforded where the failure to appear is the fault of counsel.'"].) That is precisely what occurred in this case when Elperin not only failed to oppose the motion for terminating sanctions but also essentially abandoned Continental after filing the unverified complaint to initiate the action.

Whether the moving party is seeking mandatory or discretionary relief, the application for relief "shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted . . . ." (§ 473, subd. (b).)[4] "The plain object of the provision was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court." (*Los Angeles County v. Lewis* (1918) 179 Cal. 398, 400.) Substantial compliance with the requirement is sufficient; thus, an application will not be denied solely on the basis the proposed pleading does not accompany the motion as long as it is filed before the court hearing. (*County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 838 ["objectives of the 'accompanied by' requirement, i.e., a screening determination that the relief is not sought simply to delay the proceedings, is satisfied by the filing of a proposed answer any time before the hearing"]; *Job v. Farrington* (1989) 209 Cal.App.3d 338, 341 [substantial compliance even though proposed answer filed prior to court hearing date but more than six months after default entered].)

Continental did not file a copy of its proposed opposition to the motion for terminating sanctions or any of the outstanding discovery responses with its motion to set

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[4] The attorney affidavit provision has incorporated the attached-pleading requirement by specifying the application for relief must be filed "in proper form." (§ 473, subd. (b).)

aside the dismissal of its action. LRA argues the failure to attach the discovery responses deprived the trial court of jurisdiction to consider the motion, even if granting relief to Continental would otherwise be mandatory. In the trial court, but not on appeal, Continental argued it was not required to attach its discovery responses because they are not "pleadings" as defined by the Code of Civil Procedure and are not essential to its request for relief.[5]

Continental is correct that "pleadings" as a defined term does not include discovery responses or memoranda of points and authorities in support or opposition to a motion. (See §§ 420 ["pleadings are formal allegations by the parties of their respective claims and defenses, for the judgment of the Court"], 422.10 ["pleadings allowed in civil actions are complaints, demurrers, answer and cross-complaints"].) Although there are compelling reasons to conclude the Legislature did not intend such a narrow construction of the term in the context of an application for relief from a default or dismissal -- requiring a party to attach the omitted discovery responses or at least set forth a satisfactory opposition to the motion for terminating sanctions that not only explains why the discovery has not yet been provided but also details an appropriate timetable to do so is the functional equivalent in this context of the requirement a defendant file an answer or other proposed pleading whose omission led to a default judgment -- we need not decide that question. In light of the public policy that """favors the determination of actions on their merits""" and the concomitant requirement that "'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default'" (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 371-372), we conclude, albeit reluctantly, Continental has substantially complied with the attached-pleading requirement.

The appropriate focus is not on Continental's failure to attach its discovery responses to the motion for relief, but on its failure to attach an opposition to the motion

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[5] In its opening brief on appeal Continental did not address its failure to provide the trial court either a proposed opposition to the motion for terminating sanctions or the actual discovery responses. It did not file a reply brief even though this issue was raised by LRA in its respondent's brief.

for terminating sanctions that explained why, although severe sanctions may have been warranted, dismissal was not. Had it attached such an opposition brief, Continental would have proffered the same facts as it did in its motion to set aside, including the declarations and evidence filed in support establishing Elperin essentially abandoned Continental because of his illness. Although it would have been more prudent, and certainly more persuasive, for Continental to attach its discovery responses to the opposition, it was not required to do so. Because the motion to set aside itself contained the same facts the opposition brief would have contained, the objective of the attached-pleading requirement to determine "the relief sought is not simply to delay the proceedings" and the party is acting in good faith has been satisfied. (*County of Stanislaus v. Johnson*, *supra*, 43 Cal.App.4th at p. 838; see *Estate of Parks* (1962) 206 Cal.App.2d 623, 634 [no need to attach copy of proposed objection to report of inheritance tax appraiser when substance of objection contained in verified application and declaration].)

In sum, Continental was entitled to mandatory relief from the dismissal of its action as a terminating sanction based on attorney fault. It was error for the trial court to deny the motion.[6]

DISPOSITION

The judgment is reversed. Continental Lynwood LLC is to recover its costs on appeal.

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PERLUSS, P. J.

We concur:

JOHNSON, J. WOODS, J.

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[6] Because the judgment in favor of LRA must be reversed, LRA is no longer the prevailing party in the action; and the award of attorney fees to LRA, also challenged by Continental on appeal, must similarly be set aside.